quit addressed to the defendant's attorney at No. 90 Batu Road, Kuala Lumpur. This was returned to the plaintiff undelivered. On the 18th day of February, the plaintiff received by registered post an undated cheque from the defendant's attorney for the arrears of rent due. The fact that the cheque was undated is immaterial because the plaintiff could have dated it himself.

On the 19th day of February, 1947, the plaintiff wrote to the defendant's attorney, and this time he addressed his letter to No. 77 Java Street, Kuala Lumpur, where the defendant's attorney resided, informing him as follows :—

> I am to inform you that I have already sent you on 15th instant a notice to quit and give vacant possession of the said premises to me on the 31st day of March, 1947, as you have totally failed to pay rent for the month of January 1947.
>
> You should therefore comply with my said notice dated 15th instant, as you are always an irregular and troublesome tenant.
>
> With regard to your said undated cheque, as I cannot cash it, I am retaining it with me to be shown to Court when I institute ejectment proceedings, if you fail to quit according to my said notice.

On the 21st day of February, 1947, the plaintiff again sent by A.R. post the notice to quit, addressed to the defendant's attorney at No. 77 Java Street, Kuala Lumpur. This time the notice was received, but by then the defendant's attorney had tendered the arrears of rent due.

The defendant's attorney refused to give vacant possession and so the plaintiff instituted this suit.

Mr. Sen, for the defendant, submitted that since the defendant's attorney was not in arrears with his rent when the notice to quit came to his notice, the plaintiff could not commence any ejectment suit in Court without the permission of the Rent Assessment Board, in accordance with section 7 of the Rent and Charged Land (Restriction) Enactment 1940, of the Federated Malay States.

Mr. Hastings, for the plaintiff, submitted that the proviso to that section applies whenever the rent has been in arrear for fourteen days, as in this case, and that it was immaterial that the arrears of rent had been tendered before the notice to quit came to the notice of the defendant's attorney.

I am unable to agree with that submission. The material date at which rent should be in arrears in order that a landlord may succeed in a suit in Court to recover his premises without permission of the Rent Assessment Board is the date of service of the notice to quit.

Mr. Hastings further submitted that the defendant's attorney had deliberately evaded service by refusing to accept the first A.R. letter, which contained the notice to quit, and that he should not derive any advantage from his own evasion.

There is no evidence of deliberate evasion on the part of the defendant's attorney, and the Court of Appeal decision in the case of *Hogg v. Brooks*[1] is against this second submission made by Mr. Hastings.

Accordingly the plaintiff must fail in this suit, and there will be judgment for the defendant with costs.

Suit Dismissed.

PUBLIC PROSECUTOR v. SALAMAH BINTE ABDULLAH and PUBLIC PROSECUTOR v. ONG ENG KIAT.

[App. Crim. Juris. (Taylor, J.) July 26, 1947]

Criminal Procedure Code Section 113 — Evidence Ordinance Section 27 — Statement to Police — Admissibility — Alteration of Charge — Criminal Procedure Code Section 173.

These two appeals were dealt with together as they raised similar questions as to the admissibility of statements made to the Police in the course of a Police investigation. Section 113 of the Criminal Procedure Code provides that no statement made to a Police Officer in the course of an investigation shall be used as evidence and also gives a number of exceptions to this rule. One of these exceptions is when the statement relates to the discovery of a fact and then so much of the statement as distinctly relates to the discovery may be proved under Section 27 of the Evidence Ordinance.

Held, (1) that statements by an accused person to the Police in consequence of which facts are discovered, are admissible only if the accused was in actual custody at the time; (2) that the admissible portion of such statement is limited to the facts discovered and does not extend to other information about the articles found.

Observations as to the alteration of charges. The alteration of a charge after the close of the defence should not be prejudicial to the accused.

Case referred to :—

(1) *Sambu v. Rex* (1947) M.L.J. 18.

Taylor, J. : — As these two appeals raise similar questions of the admissiblity of evidence it is convenient to deal with them together. In the first case the appellant, who is a married woman with five children, was convicted of dishonestly receiving some stolen cloth and sentenced to two months simple imprisonment.

The facts are simple. One Nayan, a relative of the appellant robbed a pedestrian of a bundle of clothing; the time of day at which this occurred is not stated. In the middle of the night of, or following, the robbery Nayan handed two of the stolen articles to the appellant to keep for him. On the following day a Police Officer, who was investigating the report

made by the pedestrian called at the appellant's house. She pointed out some coconut husk, outside her house, about 10 feet from the steps. The Officer found the stolen goods hidden under the husk.

In his evidence in chief the Officer confined himself, as I think rightly, to the bare facts of the finding and made no allusion at all to anything said by the accused.

In answer to the Court, however, he said :—

> When accused pointed out to me where these exhibits were hidden under the coconut shell she said in explanation that she kept them there so that they would not be stolen and that she had had them given to her by Nayan.

Immediately after that she was arrested.

The evidence can hardly have been given except in answer to a direct question to the effect — "Did she say anything when she pointed out the place?"

Section 113 of the Criminal Procedure Code provides that no statement made to a Police Officer in the course of an investigation shall be used as evidence except :—

(a) To impeach credit, as provided by subsection (ii);

(b) When the statement relates to the discovery of a fact, so much as distinctly relates to the discovery may be proved under Section 27 of the Evidence Ordinance;

(c) When the statement relates to the cause of the death of the person making it, under Section 32 (1) Evidence Ordinance;

(d) When the statement itself is the subject matter of the charge, Section 113 (iv)).

The second of these is the only one applicable to the present instance.

As there have been a number of cases lately in which these provisions have not been rightly understood and applied I will try to make the matter more clear.

The fundamental principle is that hearsay is not admissible.

As the Judge said in one of the most famous trials on record "You must not tell us what she told you".

Generally speaking, therefore, every witness, and especially a Police witness, must confine his evidence to what he himself did or saw. He must not relate conversations. It is wrong to say "In consequence of something that Mat Arif told me I went to his house". That, in the context, frequently suggests what Mat Arif said — which is inadmissible. The witness may say "From information received, I went to Mat Arif's house". But even this, though conventional, is often better omitted. The point is, what did the witness find when he got there and it is preferable to omit all references to conversations, direct or indirect, and simply to say "I went to Mat Arif's house".

All the circumstances in which it is permissible to relate what some one else said are exceptions to the general rule and must be construed strictly. Great care should be taken not to admit anything which is not expressly covered by the wording of the exception.

Section 27 provides that when an accused person who is in custody has told the Police something, and in consequence of what he said they find out some fact, the Police may afterwards give evidence of that portion of what the accused said which distinctly relates to the fact discovered.

In my experience the Supreme Court has always construed very strictly indeed the words "distinctly relates". If a written record of the statement is produced it cannot be put in bodily. Only the specified portion can be read and it is not permissible to bring in any extra bits of information which may occur even in the same paragraph. It is, of course, necessary to give enough of the context to shew that the statement does refer to the fact discovered.

I remember one case where Mr. Justice Whitely, a Judge of exceptional experience in Criminal law, took a typed statement and crossed out certain sentences and parts of sentences, leaving in just a few words to this effect "I hid the earrings in a hole in the atap wall". The Police witness then related how he went to the place and found the earrings. Another witness was called to identify them.

In this case the fact discovered was that the cloth was hidden under the coconut shell. The section does not say, or mean, that where any object is found, so much of the statement of the accused as related to that object, can be repeated in evidence. The exception is limited to so much of the statement as related to the fact discovered — that is to the fact of the finding. It does not extend to other facts relating to the articles found.

The accused made two statements about the cloth, viz :—

(a) That she kept it there so that it would not be stolen, and

(b) That the cloth was given to her by Nayan.

Are these statements admissible? The former is evidence of her state of mind when she hid the cloth and distinctly relates to the hiding on the previous night, rather than to the finding by the Police on the following day. However the reason why she put it there might be said to relate to it being found there

and it might perhaps be admitted on this ground if there were no other objection.

The second statement, however, relates exclusively to the previous history of the cloth. The fact that it was given to her by Nayan is not related to the finding by the Police and this last sentence is not admissible.

There is, however, another point. The Procedure Code forbids the use of all statements made during Police investigation, whether by the accused or by any other person, except in the special circumstances mentioned. The Evidence Ordinance permits the use of the specified part of such a statement received from an accused in custody — that is, even the excepted portions which "distinctly relate" are only admissible if the accused was in custody when the statement was made.

The learned District Judge expressly finds in his judgment that the accused had not been arrested when she made the statement but he thinks that she can be held to have been in custody because if at the moment she had tried to run away she would have been seized. I cannot accept this view. Running away to avoid interrogation is quite a different thing from escaping from custody.

It is possible that the learned District Judge was influenced by a passage in *Sambu's* case[1] though he did not cite it. Sambu was carrying goods at night in the dock area and when the Police flashed torches on him he ran away. They chased and caught him and it was only after he had been caught that he made any statement. On appeal the question whether the statement was admissible arose and Brown J. had therefore to consider whether Sambu was in custody when he made the statement. In the course of his judgment he said :—

> In order to decide whether the appellant was in custody it is only necessary to consider what would have happened if at that time he had tried to run away.

That, however, is not meant as a general test. The words must not be detached from their context and read as applicable in all circumstances. They must be read as governed and qualified by the particular facts of the case in which they occur and which are fully set out in the opening paragraphs of the judgment. On those facts, I entirely agree with the conclusion reached by Brown J. but it does not apply to the case before me where the facts are materially different. When the Police Officer went to this appellant's house he was on investigation, pure and simple. He questioned the woman and at that stage she was "any person" under Section 113. She might have become a witness against Nayan. The Officer did not make up his mind whether to arrest her or call her as a witness until he had finished his questioning and search. What she said during the investigation is made inadmissible by the Procedure Code and the exception made by the Evidence Ordinance is limited to persons in custody. The whole of her statement during the investigation and before her arrest is therefore inadmissible.

I do not think, however, that she was prejudiced in her defence. The unexceptionable evidence clearly threw on her the onus of accounting for her possession. She merely proved that she received the cloth from a man who was related to her, and in no way negatived the inference of guilty knowledge arising from the concealment. She was therefore rightly convicted except that I think the charge should have been for retaining rather than receiving. This offence is in some ways more serious than theft. If there were no receivers there would be few thieves.

The only point in favour of the appellant is that when it was clear that the Police knew she had the cloth she saved them the trouble of a detailed search to locate it. This is not enough to justify any alteration of the sentence.

This appeal must therefore be dismissed.

The facts in the second appeal are these. The complainant is a teacher, living alone in a room in a house with other occupants. The door of the room was not locked so that anyone who had access to the house could enter the room. The accused was friendly with the complainant and frequently visited him in his room.

The complainant missed a wrist-watch, a fountain pen and $5 in cash from the drawer of a desk in his room. He did not suspect the accused. Two or three days later the Police found the accused in an amusement park with the wrist-watch in his pocket. They arrested him, and took him to the Central Police Station at Kuala Trengganu. Later the pen was found and the accused was charged in the District Court with dishonestly receiving the watch and pen. I would again remark that the charge is inaccurate. There was never any suggestion that he received the things. It should have been retaining under the same section. The Inspector in charge of the Police Station gave evidence as follows :—

> The accused informed me that there was also a fountain pen in his house. I went with him and made a search and accused pointed out the pen, in an almeirah, in a jacket pocket. I took the pen .....I identify it.

This distinctly relates to the finding and is admissible. But the Officer went on to say :—

> Accused admitted ownership of the watch and pen and said he had taken them from a room in the Chinese Club where the complainant lived.

I do not follow what is meant by the words "accused admitted ownership". However, though this evidence relates to the things recovered, it does not relate to the fact of the finding and it is therefore not admissible.

The accused then gave evidence. He is 18 years old and a house owner. He said that he and complainant frequently borrowed one another's things but on this occasion he took them without asking permission or even telling the complainant afterwards. He also said that he told the detective who arrested him that the watch belonged to the complainant.

This last statement was not admissible. Section 113 excludes such evidence and applies equally to both sides. In practice, of course, it is not always possible to confine an accused person to strictly admissible evidence. He must be allowed to tell his own story and such things slip in. I do not criticise the inclusion of this one sentence. I would point out, however, that the law of evidence applies to all witnesses and that even an undefended prisoner giving evidence on his own behalf should be checked if he tries to relate conversations.

After the evidence for the defence was concluded the Prosecuting Officer argued that the offence proved was theft and that it "looked like a well planned theft". The Court then framed a fresh charge of theft in a dwelling under Section 380, Penal Code. The accused claimed trial and reiterated that though he admitted the taking, he did not steal. He was convicted and sentenced to five months rigorous imprisonment.

Now the proper time to amend a charge is at the close of the prosecution. This is expressly provided by Section 173 (h) of the Code which, indeed, not merely authorises but positively requires the Court to consider the charge at that stage and, if necessary, amend it. It is true that a charge can be altered at any stage and the alteration in this case, late though it was, is not illegal in the sense that it was not in accordance with the Code but in my view it was in the circumstances unjust. It was not an amendment but a substitution and further, it was the substitution of a much more serious charge. The maximum punishment for receiving (as for ordinary theft) is 3 years, whereas the punishment for theft in a dwelling is 7 years. It is clear that the new charge was based on the evidence of the accused himself and it offends against the principle that the prosecution must prove their case. If the inadmissible evidence is disregarded the prosecution witnesses merely proved possession and the only question is whether the accused has accounted for it. I agree that his explanation was unsatisfactory and that a conviction for retaining could be supported. The circumstance that the accused had access to the complainant's room points to him being also the thief but I cannot find anything on which to base the inference that the theft was planned. It seems to me more likely that the accused went to call on his friend and finding himself alone in the room yielded to a covetous impulse. "Opportunity makes the thief". The accused is young and has a clean record. To send a first offender to goal, without any option may be harsh and is generally impolitic. A few months of association with other and worse offenders is not unlikely to have a permanent ill effect on a youth, perhaps weak but not vicious or irreclaimable. Moreover imprisonment for however short a term is, in practice, more damaging to the reputation than conviction. It makes it more difficult for him to lead an honest life after release and he may become an habitual offender. Leniency is often in the interest of the public, apart from giving the individual a second chance.

It appears that the accused had had the watch and pen for one or two days without disposing of them and this supports the view that the offence was not a commercial or premeditated theft.

The appeal is therefore allowed in part. The conviction is amended to one of retaining; the sentence of imprisonment is quashed and in lieu the accused will be bound over for twelve months with one surety in $100, to come up for judgment if called upon and meantime to be of good behaviour.

In conclusion I wish to make it clear that nothing in this judgment reflects on the conduct of the Police in their investigation. They are authorised to question suspects and to record statements after arrest and to use the information so obtained for further enquiries. It often happens, however, that some of the evidence properly recorded in the Investigation Papers is not legal evidence against the accused. I hope what I have said to-day may help both Magistrates and Prosecuting Officers to distinguish between what is admissible and what is not.

Order Accordingly.